BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 96-327-E - ORDER NO. 97-661

AUGUST 4, 1997

IN RE: Residents of Red Hill Area of Lee County, Complainants/Petitioners, vs. City of Camden and Black River Electric Cooperative, Defendants/Respondents.	)	ORDER DENYING PETITION FOR REHEARING AND RECONSIDERATION

This matter comes before the Public Service Commission of South Carolina (the Commission) on the Petition for Rehearing and Reconsideration filed by the City of Camden (the City or Camden), pursuant to our issuance on July 9, 1997 of our Order No. 97-582. For the reasons stated below, the Petition is denied.

Order No. 97-582 assigned the Red Hill area to the Black River Electric Cooperative, based on the inadequacy of electric service provided to the area by the City. The first allegation of the City's Petition alleges that as of the date of the hearing there was no inadequacy of service, and, therefore, no justification for the relief granted by us. The record reveals otherwise. Although the testimony of G.F. Broom, Camden's City Manager, and A.J. Molnar, IV, an engineer, show that the City had

made at least some improvements, the improvements were not complete. Broom testified that, for proper electric service, a new three-phase line must be constructed, and that it would take three to four years to completely remedy the problems that the citizens of Red Hill were experiencing. Molnar testified that Mr. Capell and the other Petitioners should be seeing the results of some of the City's first improvements, but that the City was still attempting to make further changes, based on Molnar's recommendations. Thus, the allegation that, on the date of the hearing, there was no inadequacy of service is without merit.

Second, the City states that no application for assignment of territory by any electric supplier or suppliers was before the Commission, and it was error for the Commission to assign unassigned territory. An examination of the Petition in this case, reveals, however, that the Petitioners are asking specifically to be assigned to the Black River Electric Cooperative for their electric service. Thus, the City is simply incorrect in making this allegation.

Third, Camden states its belief that Carolina Power & Light (CP&L) should have been notified before an assignment of territory was made. We do not believe this to be the case. The only providers of electricity concerned with this case were the City of Camden and Black River. CP&L was simply not a party to the proceeding, and did not need to be, under the circumstances of the case.

Fourth, the City states its belief that, since it is not an

"electric supplier," that the Commission could not grant relief under S.C. Code Ann. Sections 58-27-650 or 58-27-660. In actuality, as the City notes in its Petition, the territory at issue was unassigned. Therefore, relief was granted under S.C. Code Ann. Section 58-27-640 in any event, and not under the Sections mentioned by the City.

Fifth, we disagree that the relief requested was under Section 58-27-660, as stated above. We also disagree that the only relief that we could have granted was under Section 58-27-1520. The City simply misses the point. If the territory was never "assigned" in the first place, there is no need to "reassign" it. It must first be assigned under Section 58-27-640. The fifth allegation of error is without merit.

Sixth, with regard to the burden of proof issue, South Carolina law appears to put the burden of proof of the right to serve the Red Hill area squarely on the City's shoulders, while keeping the burden of proof of all other issues with the Petitioners. A party having a peculiar knowledge of facts or control of evidence relating to an issue has the burden of evidence as to that issue. Roberts v. Roberts, 296 S.C. 93, 370 S.E. 2d 881 (Ct. App., 1988), affirmed as modified, 299 S.C. 315, 384 S.E. 2d 719. Since the City had peculiar knowledge of whether or not it had the right to serve the Red Hill area, it was up to the City to show that it did, when faced with a Petition before the Commission to allow the Black River Electric Cooperative to serve the area. This placed the legality of the service by the

City to the area specifically in issue. Certainly, the Petitioners had the burden of proof on all other issues, but the City had the distinct burden to show that it was legally serving the area. As per our Order, the City failed to meet that burden. We ascertain no error.

The seventh and eighth allegations of error are related to whether or not the Commission properly took judicial notice of certain facts. First, we took judicial notice of a lack of any Certificate of Public Convenience and Necessity in our files that would allow the City of Camden to serve the Red Hill area. Second, we took judicial notice of the adequate and dependable service provided by the Black River Electric Cooperative. We feel we were correct in taking judicial notice in both instances. With regard to the Courts, the Courts should take judicial notice of whatever is or ought to be generally known within the limits of their jurisdiction. State v. Broad River, 177 S.C. 240, 181 S.E. 41 (1935). With regard to the lack of a Certificate, a Court can take judicial notice of its own records, files, and proceedings for all proper purposes, including facts established in its records. Freeman v. McBee, 280 S.C. 490, 313 S.E. 2d 325 (Ct. App., 1984). We believe that this Commission may take judicial notice of the same matters as the Courts can. Therefore, we believe that we can certainly properly take judicial notice of a lack of a certificate in our files. Further, with regard to the lack of certificate, we were merely noting the requirements of the S.C. Code. What we did or did not do prior to the present

proceeding is irrelevant.

With regard to the adequacy and dependability of the service of Black River, we note that a trial judge is not prohibited from taking judicial notice of a collateral fact of which he has personal knowledge. Gamble v. Price, 289 S.C. 538, 347 S.E. 2d 131 (Ct. App., 1986). Further, a Court can take judicial notice of a fact, if sufficient notoriety is attached to that fact so as to make it proper to assume its existence without proof. Eadie v. H.A. Sacks Co., ___S.C.___, 470 S.E. 2d 397 (Ct. App., 1997). Again, we believe that this Commission should have the same opportunity to take judicial notice as would a Court. The fact that Black River has provided adequate and dependable service is certainly a matter within our personal knowledge, and bears enough notoriety to be established as a fact without further proof. The City's assignments of error are again without merit.

Ninth, the City states that it was clear error for the Commission to deny the City's Motion to Strike the fact that the residents of Red Hill had no vote in Camden elections. A Motion to Strike is one which is addressed to the sound discretion of the trial court and the court's discretion will not be reversed absent an abuse of discretion. Totaro v. Turner, ___S.C.___, 254 S.E. 2d 800 (1979). We believe that this principle is also applicable to the Commission. We do not think that the City has shown an abuse of discretion in our failure to grant its Motion to Strike, so we must conclude that the assignment of error is also non-meritorious.

Lastly, the City complains about a number of alleged procedural errors committed by the Commission. It appears to us that all of the matters discussed are, like the granting or denial of the Motion to Strike above, within our discretion. Further, we do not think that Camden was prejudiced because of these matters.

First, it should be noted that the Commission allowed the Complainants to pre-file their testimony after the original deadline only because the Commission believed that parties not represented by counsel should be given some leeway in filing. No prejudice resulted to the City, since it already knew the gravamen of the Complainant's case in any event. Second, denying a Motion for Continuance is a matter within the Court's (and, likewise the Commission's) discretion. See, e.g., Williams v. Bordon's, Inc., 274 S.C. 275, 262 S.E. 2d 881 (1980). Third, granting a Petition to Intervene by an additional complainant on the eve of hearing was not prejudicial to the City, since the additional complainant did not participate in the hearing, and the additional complainant's complaint was known to be the same as the other complainants who were already in the case. Finally, with regard to the allegation about "elevating the probative value of the testimony of the Complainants" and minimizing that of the City's witnesses, said allegation is unavailing. The Commission sits "akin to a jury of experts." Hamm v. Public Service Commission, 309 S.C. 282, 422 S.E. 2d 110 (1992). Therefore, the Commission may give what weight it deems appropriate to whatever witnesses that it deems appropriate. The Commission, in this instance,

merely placed more weight on the testimony of the Petitioners than it did on the testimony of the City's witnesses. We may not be faulted for doing so under the law.

Because of the reasoning stated above, the City's Petition is denied. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Chairman

ATTEST:

Deputy Executive Director

(SEAL)